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08-CV-00375-ORD

UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF WASHINGTON
 AT SEATTLE

05 RON WATERMAN,) CASE NO.: C08-0375-MJP
 06)
 06 Petitioner,)
 07)
 07 v.) ORDER DENYING PETITIONER'S
 07) HABEAS PETITION WITHOUT
 08 KAREN BRUNSON,) PREJUDICE
 08)
 09 Respondent.)
 09)
 10)

11 The Court, having reviewed Petitioner's petition for writ of habeas corpus, respondent's
 12 answer thereto, the Report and Recommendation of Mary Alice Theiler, United States Magistrate
 13 Judge, Petitioner's objections (Dkt. No. 8) and the remaining record, does hereby find and Order:

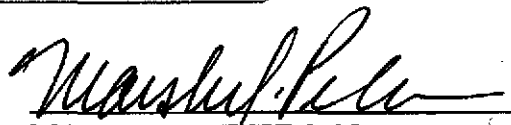
- 14 (1) The Court adopts the Report and Recommendation;
- 15 (2) Petitioner has not exhausted his state court remedies. "Before a federal court may
 16 consider the merits of a state prisoner's petition for a writ of habeas corpus, the prisoner
 17 generally must first exhaust his available state court remedies." Smith v. Baldwin, 510
 18 F.3d 1127, 1137-38 (9th Cir. 2007). Petitioner suggests that his failure to exhaust may
 19 be excused because he is "actually innocent." But the "actual innocence" exception to the
 20 state exhaustion rule applies once a petitioner has procedurally defaulted, that is, if the
 21 petitioner fails to present his federal claims to the state's highest court, and if he is
 22 procedurally barred from presenting those claims to the appropriate state court at the time

01 of filing his federal habeas petition. A petitioner may then overcome that procedural
02 default by "presenting sufficient evidence to demonstrate that failure to consider the
03 claims will result in a fundamental miscarriage of justice," including by making a
04 showing of "actual innocence." Id. at 1139 (internal quotation marks omitted). But here,
05 Petitioner has not procedurally defaulted. As recently as March 31, 2008, his direct
06 appeal to the Washington Court of Appeals remained pending and his personal restraint
07 petition ("PRP") was stayed pending final resolution of his direct appeal. Although Mr.
08 Waterman is frustrated by the fact that he has to wait for the state courts to consider the
09 merits of his appeal and then consider his PRP, the statute and case law make no
10 exception in this case to the rule that a petitioner must first exhaust state court remedies
11 before presenting his federal habeas claims. See 28 U.S.C. § 2254(b).

12 (2) Petitioner's habeas petition and this action are DISMISSED, without prejudice;
13 and,

14 (3) The Clerk is directed to send copies of this Order to petitioner and to Judge
15 Theiler.

16 DATED this 6 day of June, 2008.

17 
18 MARSHA J. PECHMAN
19 United States District Judge
20
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